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HEWLETT PACKARD COMPANY P O BOX 272400, 3404 E. HARMONY ROAD INTELLECTUAL PROPERTY ADMINISTRATION FORT COLLINS, CO 80527-2400			WON, MICHAEL YOUNG	
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* NOAM FRAENKEL, GUY GOLDSTEIN, IDO SARIG,  
and REFAEL HADDAD

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Appeal 2007-2703  
Application 10/057,295  
Technology Center 2100

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Decided: March 17, 2008

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Before JAMES D. THOMAS, JOSEPH L. DIXON,  
and ST. JOHN COURTENAY III, *Administrative Patent Judges*.

THOMAS, *Administrative Patent Judge*.

DECISION ON APPEAL

This appeal involves claims 1 through 39. We have jurisdiction under 35 U.S.C. §§ 6(b) and 134(a).

As best representative of the disclosed and claimed invention, independent claim 1 is reproduced below:

1. A method of monitoring the operation of a deployed web site system, the method comprising:
  - (a) monitoring response times of a web site system as seen from multiple geographic locations, including locations that are geographically remote from each other and from the web site system;
  - (b) concurrently with (a), monitoring a plurality of server resource utilization parameters associated with the web site system from a computer that is local to the web site system; and
  - (c) automatically analyzing the response times and server resource utilization parameters as monitored in (a) and (b) over a selected time period to evaluate whether a correlation exists between changes in the response times and changes in values of the plurality of server resource utilization parameters.

The following references are relied on by the Examiner:

Maccabee	US 6,108,700	Aug. 22, 2000
Claiborne	US 6,462,833 B1	Oct. 8, 2002
Martija	US 7,039,689 B2	May 2, 2006 (filing date Feb. 25, 1999)

In a first stated rejection, the Examiner rejects claims 1 through 9, 11 through 13, 15 through 22, and 25 through 39 as being anticipated under 35 U.S.C. § 102(e) by Maccabee. This reference is relied upon by the Examiner in the second and third stated rejections under 35 U.S.C. § 103. These include the additional reliance upon Martija in a second stated rejection as to claims 10 and 14; and the additional, separate reliance upon Claiborne to Maccabee as to claims 23 and 24.

Rather than repeat verbatim the positions of the Appellants and the Examiner, reference is made to the Brief and Reply Brief for Appellants' positions, and to the Answer for the Examiner's positions.

#### OPINION

For the reasons set forth by the Examiner in the Answer, as amplified here, we sustain each of the three separately stated rejections of the claims on appeal.

Before we address the separately stated rejections, the teaching value of Maccabee appears to us, based upon the positions of the Examiner and Appellants, to have been incompletely considered. The title of this patent relates to end-to-end response time measurements and decompositions of transactions. Even as revealed in the abstract and pointed out by the Examiner, Maccabee's environment relates to client-server relationships in an Internet environment. Much is said in the prior art discussion at columns 1 and 2 of this reference relating to response time determinations of user transactions. This is more focused beginning at column 2, line 45, where a given transaction is decomposed into client server relationships from the time spent in the client, in the network and in the server separately. It is also known in the next paragraph to measure server mainframe response times and delays. It is thus an aim in the first paragraph at the top of column 3 of Maccabee to determine performance metrics at different measurement points within a given path taken by a business transaction. Thus, the focus of Maccabee's approach is to deal with response times associated with each of these three separate portions or segments of a given transaction. The environment of use is set forth in Maccabee's prior art figure 1A.

Monitoring capabilities are shown initially in figure 1B to indicate that monitoring occurs at the client, application server, and at a database server to monitor events therein. Figure 1C shows that in terms of an entire transaction generation capability, events are correlated and collated within the transactions associated with respective devices or portions of a given transaction. Report generation is shown in figure 1D in a general way. As shown in figure 2 and its corresponding discussion beginning at column 9, line 11, the logical system components of Maccabee's contribution in the art relate to event generation, transaction generation, and report generation. The system monitored by the sensors shown in the earlier figures as well as figure 2 relates to an application being monitored such as an application server also in these earlier figures.

When taken from these additional perspectives over those already provided by the Examiner, the artisan would have well appreciated that the first argued feature of independent claim 1 of "monitoring response times of a web site system as seen from multiple geographic locations" is illustrated in the various figures as well as the functional description just mentioned. Additionally, it is seen that the focus of Maccabee's approach is to do the automatic analyzing functionalities of clause (c) of analyzing response times as to sever utilization parameters over selected time periods. As recognized by Appellants' arguments, there are significant teachings of correlation and collations of data with respect to the overall environment of determining response times and any changes in performance over time. It is these two

features that are commonly recited in the other independent claims 13, 20, 25, and 33 on appeal and to which substantially similar arguments are presented in the Brief and Reply Brief for our consideration.

The last third of the abstract indicates Maccabee's system is extensible, such as having the capability of extending its measurement and reporting capabilities by the addition of software and/or hardware modules to extend the operational capabilities of his system. Measurement capabilities are taught to be dynamically activated or deactivated. In this light, the system extensibility is discussed at column 4 in the Summary of the Invention section such as to indicate at the bottom of the column, as relied upon by the Examiner, that time-stamp and correlation data may be used by the system to associate events with other events and transactions. Additionally, Macabee teaches that the changes set forth and response times are of significance here as well as the teaching that the correlation data may be any type of data. Thus, the combinability of Martija in the second stated rejection and of Claiborne in the third stated rejection, both within 35 U.S.C. § 103, would have been clearly contemplated by the artisan with these expansive teachings in Maccabee as the starting point.

Moreover, with respect to the particular labels attached to the data and the compilation and correlation information of the claims on appeal as particularly argued in the Brief and Reply Brief, no patentable weight can be given in light of these expansive teachings of the nature and type of data and correlations already taught in Maccabee. Also, we find that the particular labels attributed to the data are considered non-functional descriptive material and are neither stated in the claims to be directly used nor reflective

of any process or method step differences over the teaching value in Maccabee. Nonfunctional descriptive material cannot render nonobvious an invention that would have otherwise been obvious. *In re Ngai*, 367 F.3d 1336, 1339 (Fed. Cir. 2004). Cf.. *In re Gulack*, 703 F.2d 1381, 1385 (Fed. Cir. 1983) (when descriptive material is not functionally related to the substrate, the descriptive material will not distinguish the invention from the prior art in terms of patentability).

The Examiner's responsive arguments to the principal Brief beginning at the bottom of page 17 of the Answer directly addresses each of the respective arguments for each of the respectively argued claims in the Brief. In addition to our earlier remarks, we generally agree with this assessment by the Examiner.

With respect to the second stated rejection, the remarks at pages 13 and 14 of the principal Brief on appeal do not argue that Maccabee and Martija are not properly combinable within 35 U.S.C. § 103 and do not argue or otherwise dispute what the Examiner relies upon in Martija. Patentability is argued to be based upon features already recited with respect to claim 1 which was rejected under 35 U.S.C. § 102 over Maccabee alone.

As to the third stated rejection, we are unpersuaded by the remarks at pages 13 and 14 of the principal Brief on appeal where Appellants do not contest what the Examiner said is taught in Claiborne and the general arguments of lack of motivation to combine the teaching of Maccabee and Claiborne at page 15 of the Brief have been adequately addressed by the Examiner at page 28 of the Answer. The teachings at column 7, lines 54 through 60 of Maccabee, outlined by the Examiner, dovetail considerably

with respect to the teachings we already identified in Maccabee that relate to prospective types of data encompassed generally by Maccabee anyway. As to the Reply Brief, Appellants repeat similar arguments made in the principal Brief. Appellants appear to focus upon the assertion that Maccabee does not have the same purpose of detecting correlations between changes and the response times and changes in value of server resource utilization parameters. This appears to be the same second argument made with respect to each independent claim relating to the feature of clause C of claim 1, for example. As indicated earlier, the patentability will not be predicated based upon the characterization of data such as changes and response times or changes in utilization parameters as a starting point.

Notwithstanding this, we find the expansive nature of Maccabee's transactional data metric compilation approach teaches the determination of changes and values of any kind of parameter relating to response times at any point from a server's perspective, from a client's perspective, and from a network's perspective (as well as all three of them). Therefore, we find Maccabee either explicitly or inherently discloses the broadly defined limitations argued in the Brief and the Reply Brief.

In view of the foregoing, the decision of the Examiner rejecting various claims under 35 U.S.C. § 102 and 35 U.S.C. § 103 is affirmed. Appellants have not shown any error in the Examiner's positions according to the teachings of the applied prior art as applied to the claims on appeal.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. §1.136(a). See 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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